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No. 84-1472

Supreme Court of the United States

October Term, 1984

JAMES H. LYONS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals for Lake County, Ohio and the Supreme Court of Ohio.

The Court of Appeals, Eleventh Judicial District affirmed the trial court's denial of Petitioner's Motion to Dismiss on jeopardy grounds. The Supreme Court of Ohio refused leave to appeal for the reason that no substantial constitutional question exists in this case.

The Ohio Courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is presented by the Petition for Certiorari.

HISTORY OF THE CASE

Defendant-Petitioner, James Lyons, was indicted by a Lake County, Ohio Grand Jury on two counts of Involuntary Manslaughter for the death of Harry Wyse. The first count charged Defendant-Petitioner with causing the death of Wyse as the proximate result of committing or attempting to commit a felony abduction of another man, in violation of Ohio Revised Code Section 2903.04(A). The second count charged Defendant-Petitioner with causing the death of Wyse as a proximate result of committing or attempting to commit a misdemeanor menacing against another man, in violation of Ohio Revised Code Section 2903.04(B).

Defendant-Petitioner proceeded to trial by jury on June 2, 1984. The jury began deliberation on June 5, 1984, and on June 11, 1984, they were dismissed by the trial court when they were unable to reach a verdict. On June 29, 1984, Defendant-Petitioner filed a Motion for Judgment of Acquittal which was denied by the trial court. On October 2, 1984, the Ohio Eleventh District Court of Appeals affirmed the decision of the trial court. On January 16, 1985, the Ohio Supreme Court found that no substantial constitutional question existed herein and dismissed Defendant-Petitioner's appeal from the Ohio Eleventh District Court of Appeals. The present Petition for Writ of Certiorari followed.

STATEMENT OF FACTS

On December 16, 1983, Defendant-Petitioner, James Lyons, was indicted by the Lake County Grand Jury on two counts of Involuntary Manslaughter for the death of Harry Wyse. The first count charged Defendant-Petitioner with causing the death of Wyse as the proximate result of committing or attempting to commit a felony abduction of another man, Gilbert Groudle. The second count charged Defendant-Petitioner with causing the death of Wyse as a proximate result of committing or attempting to commit a misdemeanor menacing against Groudle.

Defendant-Petitioner proceeded to trial on June 2, 1984, and on Thursday, June 5, 1984, the jury began its deliberations. The deliberations continued on through Friday, June 6, 1984, when, at about 4:00 p.m., the Court sent its bailiff to inquire of the jury as to whether they were close to a verdict. The bailiff was told by the jury that they had reached an agreement on the first count but could not agree on the second count. The jury told the bailiff that they had not reduced this agreement to writing, and they did not tell him what they had agreed to, that is, guilty or not guilty.

The bailiff then relayed this message to the Court. Counsel for both sides were notified of this message, and were present when the Court called in the jury. Defense counsel, being unsure of whether the jury's "verdict" on Count One was guilty or not guilty, did not request the Court to ask the jury to seal any verdict it may have had, did not request the Court to make any inquiries of the jury, and did not request any additional instructions.

Since the jury had not reduced any verdict they may have had to writing, as is required by law and as they had been instructed to do, and since defense counsel had not

asked the trial judge to take any action, the Court had no choice but to give the jury a modified *Allen* charge and have them resume deliberations. The jury continued deliberations until 6:30 p.m. on Friday, at which point they were excused for the weekend.

The jury returned on Monday, June 11, 1984, at 8:30 a.m. and continued their deliberations until 11:45 a.m. At this time, after deliberating for thirteen and one-half (13½) hours over a three (3) day period, the jury sent a message to the Court to the effect that they could not agree on either count. The jury and counsel were then called into open Court.

The Court asked the foreman of the jury whether they were, in fact, unable to reach an agreement on either count, and the foreman indicated that they could not. The trial judge then concluded that the jury was hung. The trial judge then specifically asked defense counsel whether he agreed with the Court's assessment of the jury's status. Defense counsel made no objection, but instead concurred in the Court's conclusion. The jury was then dismissed on June 11, 1984.

On June 29, 1984, Defendant-Petitioner filed the Motion for Judgment of Acquittal on which this appeal is based. The trial court denied the Motion on August 6, 1984, and set the retrial for August 20, 1984. Despite this, Defendant-Petitioner made a Motion for Reconsideration, and on August 16, 1984, the Court denied this Motion. On August 20, 1984, Defendant-Petitioner filed a Notice of Appeal.

The action by the trial court was subsequently affirmed by the Ohio Eleventh District Court of Appeals. The Ohio Supreme Court dismissed Defendant-Petitioner's appeal from the Appellate Court on the grounds that no substantial constitutional question existed.

REASONS FOR DENYING THE WRIT

Where a jury deliberates for thirteen and one-half (13½) hours and reports to the trial court that there is no chance of their reaching a verdict, the trial court is within its discretion in finding the jury deadlocked and declaring a mistrial.

The Defendant-Petitioner argues that failure of the trial court to question each juror before declaring a jury hung and ordering a mistrial, was a violation of his constitutional rights. This argument is without merit, being supported by neither facts nor law.

The standards for determining whether a mistrial is properly declared are found in *Arizona v. Washington*, 434 U.S. 497 (1978). The Court in *Arizona* delineated two levels of scrutiny, based on the way that a mistrial can come about.

> [T]he strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused. *Id.*, at 508.

The mistrial in the case at bar was not based on an unavailability of prosecution evidence, nor is there any evidence to suggest that the prosecutor is attempting to harass the Defendant-Petitioner. Instead, the mistrial in this case clearly fits within the Court's second category, that is, "the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial." *Arizona*, at 509.

A much less stringent level of scrutiny is used in reviewing these types of mistrials. The *Arizona* Court stated that:

> . . . in this situation there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not 'manifest necessity' justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict the defendant is deprived of his 'valued right to have his trial completed by a particular tribunal.' But if he failed to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from the pressures inherent in the situation rather than the considered judgment of all the jurors . . . the trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference by a reviewing court. *Arizona,* at 509-510.

Despite this standard of deference, Defendant-Petitioner urges this Court to find that the trial court was obligated to question each juror individually as to the possibility of their reaching a verdict, and that the trial court's inquiry of the foreman was insufficient. As the Court of Appeals correctly noted, however, the determination of whether a jury is genuinely deadlocked and a mistrial declaration necessary is a case by case determination, based on the totality of the circumstances involved in each case. *United States v. Gordy,* 526 F.2d 631 (5th Cir. 1976).

> [T]he guiding principles of the *Perez* decision . . . command courts in considering whether a trial should

> be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula. *United States v. See*, 505 F.2d 845 (9th Cir. 1974) [quoting *Wade v. Hunter*, 336 U.S. 684, 691 (1949)].

From the above it is clear to see that in considering a trial court's decision to declare a mistrial, it is necessary to look to the circumstances as they existed at the time the mistrial was declared. In reviewing these circumstances, an appellate court must defer to the trial court's judgment and must not use a rigid "checklist" with respect to the trial judge's actions. Instead, the appellate court is obliged to consider that it is the trial judge who is in the best position to determine the jury's status.

In light of these standards and the circumstances of this case, the trial judge was under no compulsion to question each juror individually as to the possibility of reaching a verdict. The circumstances present before the trial judge were that the jury deliberated for a considerable period of time and then reported, on their own initiative, that they could not reach an agreement on either count. Case law in this area is in agreement that two factors which an appellate court should consider in determining whether the trial court acted within its discretion in light of the circumstances involved are the length of deliberations and the jury's own statement that they are deadlocked. *Arnold v. McCarthy*, 566 F.2d 1377 (9th Cir. 1978); *United States v. See*, *supra*. Thus, the lengthiness of the jury's deliberations here, and their own statement that they were deadlocked show that the circumstances present before the trial judge justified his actions.

Moreover, after receiving the jury's communication that they could not reach an agreement, the trial judge called the entire jury back into open court and asked the foreman whether they were, in fact, deadlocked. The foreman answered that they were, and no other juror expressed any disagreement, objection or discomfort with the foreman's assessment. Thus, the circumstances indicated that the foreman was speaking for the entire jury in his representative capacity, and the trial judge, who was in a position to observe the demeanor and expressions of the other jurors, was justified in so concluding.

The cases relied on by Defendant-Petitioner either support this conclusion or are distinguishable. In *See*, for instance, the Ninth Circuit reasoned thusly:

> No request was made by counsel for the appellants for the court to poll the jurors individually with respect to the prospect of reaching a verdict. The judge's questions in open court certainly provided both an opportunity for jurors to give contrary opinions and for the judge to gauge their individual reactions to his questions. In such circumstances, it would be inappropriate to rule that the trial judge had abused his discretion by failing to poll the jurors individually. *See*, at 852.

Similarly, in the case at bar, Defendant-Petitioner did not ask the trial judge to poll the jurors individually, and the trial judge's questioning of the foreman afforded the trial judge an opportunity to observe the reactions of the other jurors. Thus, the trial court's actions in the case at hand were in accordance with the reasoning of the *See* Court which found that "[t]he judge should question the jury in such circumstances, either individually *or through its foreman . . .*" *See*, at 851. Another case relied on by Defendant-Petitioner, *United States v. Horn*, 583 F.2d 1124

(10th Cir. 1978), in asserting that inquiry of the foreman only was insufficient for purposes of declaring a mistrial is readily distinguishable from the case at hand. In *Horn*, the trial court interrupted the jury's deliberations, brought them back into court, and determined *sua sponte* that the jury was hung and a mistrial necessary. No inquiry whatsoever was made of the jury or of the foreman concerning this determination; the trial court acted entirely on its own initiative. Under these circumstances, the *Horn* Court found a "complete lack of evidence of deadlock as of the time that the mistrial was granted." *Horn*, at 1128.

The situation in the case at hand is quite different from that of *Horn*. Here there was conclusive evidence of a deadlock: the jury's own statement, after lengthy deliberations, that they could not agree on a verdict. The jury foreman confirmed this when questioned by the trial judge, and no other juror expressed contrary feelings. Under these circumstances, the trial court's dismissal of the jury was completely within the broad discretion granted to trial judges in this area.

Defendant-Petitioner asserts that since the trial court knew of the jury's unannounced "verdict" of Friday, the Court had strong evidence that the jury was not truly hung, and thus should have made further inquiry as to the jury's activity on Friday. This argument is deficient in several respects. It must first be noted that the only evidence the trial court had before it was that the jury deliberated for thirteen and one half (13½) hours over three (3) days and reported that they could not reach an agreement on either count. The agreement on Count One had been reached on Friday. After the reporting of this agreement and the resulting occurrences, the jury returned to deliberations on Friday. They were then excused for the weekend and resumed deliberations on Mon-

day morning. So sometime between 4:00 p.m. Friday and 11:45 a.m. Monday, as a result of the deliberations process and the passage of time, the agreement on Count One dissipated, and the jury found itself unable to agree on either Count.

Jurors can and do change their minds. The trial judge was not required to speculate as to how many jurors had changed their minds, or on the deliberations process. All that he was required to do was act on the only objective evidence he had before him. The trial court concluded that the jury was deadlocked and dismissed them; this decision was supported by the surrounding circumstances and was clearly within the Court's discretion.

The fact that the jury may have reached a tentative agreement on one count of the two count indictment does not impose any duty on the trial court to make any inquiries. The jury instructions clearly stated to the jury that they were not required to agree on a verdict *on each* of the counts. The jury instructions made it clear that the two (2) counts in the indictment were separate and distinct and that a finding on one count should not influence their finding on the other count.

It is therefore clear that any tentative agreement, which was not put into writing by the jurors, was not binding on any juror, the Court, nor the prosecution. This standard was concisely set out in *McKay v. Raines*, 405 F. Supp. 363 (1975). In *McKay*, the defendant sought to introduce jury affidavits to show that the jurors had reached a tentative agreement as to one of the counts in the multi-count indictment where the original trial resulted in hung jury. The Court made it quite clear that a jury's decision is not final until it is presented to the Court, has been accepted by it, and has been assented to by the jury. The Court stated:

> Until such time jurors are not bound by votes or decisions in the jury room and remain free to register dissent up to the time the verdict is recorded. Deliberations not having been completed, no jeopardy attached which would bar a second prosecution should a mistrial be declared. . . . the affidavits themselves indicate that the jury merely made a preliminary determination of the second degree murder charge in the course of its discussion. This was not binding on any juror, the court, nor the prosecution. *McKay*, at 365.

Thus, the jury in this case was instructed that they were to consider each count separately and come to a verdict on each, in writing, before announcing it in open court. The jury did not ask for any clarification or further instructions on this matter, and upon returning from deliberations, they announced that there was "no chance" that they could reach an agreement on either count. Under these circumstances, the judge was not obligated to make any further instructions, nor was he authorized to make any inquiries of the jury regarding its failure to agree.

In *Smith v. Commonwealth*, 321 S.W.2d 786 (Ky. Ct. App. 1959), the Court cautions against the possible dangers of a trial judge improperly influencing an apparently deadlocked jury by what he says to them. The Court states that:

> [i]t behooves a trial judge to be most careful in what he says to a jury when it appears that body may be hung and he seeks to have them reach a verdict . . . A presiding judge should never inquire, or let the jury inform him, how it stands when it is apparently hung. *Id.*, at 789.

Similarly, in *State v. Middleton,* 63 S.E.2d 163 (S.C. 1951), the Court found that a trial judge had committed prejudicial error in inquiring about the jury's standing. Again wary of the possibility of the trial judge improperly influencing the jury, the Court found that "it is improper [for the trial judge] to make the jury publicly reveal their standing in regard to the conviction or acquittal of the accused." *Id.,* at 165.

As the Court stated in *United States v. See,* 505 F.2d 845 (9th Cir. 1974), "[t]he 'crucial factor' in determining the probability of agreement is a statement from the jury that it is 'hopelessly deadlocked.' " *Id.,* at 851 (quoting *United States v. Lansdown,* 460 F.2d 164, 170 (4th Cir. 1972). Given the similarity of circumstances between this case and *See,* the holding of the *See* Court seems especially applicable here:

> When a trial judge has been informed by the jury that it is hopelessly deadlocked, and when he is convinced after appropriate questioning that further deliberations might lead to a coerced verdict, he does not abuse his discretion by dismissing the jury after ten hours of deliberations [an even longer period of thirteen and one half (13½) hours was present here] following a trial of three and one half (3½) days [similar to the length of the trial here]. *See,* at 854.

Another factor which militates against acceptance of Defendant-Petitioner's position is the fact that Defendant-Petitioner failed to timely object to, and indeed concurred in, the trial court's declaration of a mistrial. Defendant-Petitioner thus consented to the trial court's decision when it was made. This consent further points to the lack of irregularity or impropriety in the trial court's actions.

This situation was considered in *United States v. Beckerman,* 516 F.2d 905 (2nd Cir. 1975). In *Beckerman,* defendant contested the discharge of a jury that had reported to the trial court that they were deadlocked. The *Beckerman* Court found that the lower court "was entitled to take the jury's word, that they were deadlocked, at face value." *Id.,* at 908.

In so finding, the *Beckerman* Court considered the failure of the appellant to make a "considered objection" as a controlling factor.

> In this predicament, if the Appellant had an interest in having guilt determined by this particular jury, he failed to make the fact known to the court. . .
>
> In dealing with the Appellant's post-trial motion to dismiss the indictment, Judge Motley stated that she construed the defendant's silence as agreement that enough time had passed. Although the defense was not totally still, it was silent on the prospect of a mistrial and nothing was said to dispel the inference of accord. 'Consent need not be express, but may be implied from the totality of circumstances attendant on a declaration of mistrial.' *United States v. Goldstein,* 479 F.2d 1061, 1067 (2nd Cir. 1973), *cert. denied,* 414 U.S. 873, 94 S. Ct. 151, 38 L. Ed. 2d 113 (1973).

This position was also adopted by the Court in *Arnold v. McCarthy,* 566 F.2d 1377 (9th Cir. 1978) when it held:

> Courts have isolated a number of significant factors which are useful in determining whether a judge has properly exercised his discretion to declare a deadlocked jury. These include: (1) a timely objection by defendant. . . . *Arnold v. McCarthy,* 566 F.2d

1377 (9th Cir. 1978). See also *United States v. Horn*, 583 F.2d 1124, 1127 (10th Cir., 1978), (a case relied on by Defendant-Petitioner).

Hence, it is clear that Defendant-Petitioner's failure to make a timely objection to the discharge of the jury, is another factor that now precludes him from successfully challenging said discharge.

CONCLUSION

In conclusion, the Plaintiff-Respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by this Court. The Petition for a Writ of Certiorari must be denied.

Respectfully submitted,

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